

ST 03-0017-PLR 07/16/2003 MANUFACTURING MACHINERY & EQUIPMENT

Under the Retailers' Occupation Tax Act, the manufacturing machinery and equipment exemption is available for machinery and equipment used primarily (over 50% of the time) in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. See 86 Ill. Adm. Code 130.330. (This is a PLR.)

July 16, 2003

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see www.revenue.state.il.us/Laws/regs/part1200/), is in response to your letter of February 28, 2003. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to AAA for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither AAA nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, the Illinois-based company identified above (the 'Company'), we are writing to request a Private Letter Ruling regarding eligibility for the manufacturing machinery and equipment ('MM&E') exemption authorized under Section 2-5 of the Retailers Occupation Tax Act (35 ILCS 120/2-5), Section 2 of the Service Occupation Tax Act (35 ILCS 115/2), Section 2 of the Service Use Tax Act (35 ILCS 110/2), and Sections 3-5 and 3-50 of the Use Tax Act (35 ILCS 105/3-5 and 3-50). Together, these acts are referred to as the 'Sales Tax Acts.'

The Department regulation governing the exemption is Section 130.330, Manufacturing Machinery and Equipment, (86 Il. Adm. Cd. 130.330).

The Company is requesting the ruling in preparation for the purchase of machinery and equipment that it believes will qualify for the MM&E exemption--namely, a milling machine that produces reclaimed asphalt paving. The Department has issued a General Information Letter (ST 01-0247-GIL) that discussed the exemption of such a milling machine, but did not rule on its status. Therefore, the Company is seeking clarification. This request is made in accordance with Section 1200.110 of Title 2 of the Illinois Administrative Code, and includes the information required pursuant to subsections (b)(1) through (b)(7) thereof.

The Company is a manufacturer of asphalt and concrete products that are used in the heavy construction business. The Company is a newly formed, single-member limited liability company ('LLC') owned by an Illinois corporation that is a construction contractor. The Company sells its products primarily to construction contractors for use in road building and other infrastructure development projects. A majority of its sales are to the corporation that owns the Company.

One asphalt product that the Company manufactures is milled asphalt, otherwise known as 'reclaimed asphalt paving' ('RAP'). RAP is tangible personal property manufactured through the process of cold milling asphalt pavement roadways. RAP can be used either in its raw form or by mixing it with other materials in a second manufacturing process known as 'hot plant recycling' to produce new hot-mix asphalt. The Company sells the RAP, or the hot-mix asphalt containing RAP, to construction contractors to be used in road bases and road fill, or for bicycle and pedestrian pathways, or for other uses.

RAP is manufactured using a milling machine, often referred to as a rotomill. The rotomill is a large piece of heavy equipment that slowly runs along a deteriorated asphalt roadway, cutting and scraping and grinding the asphalt pavement to a depth of up to 10 inches, and processing the raw material into milled asphalt—RAP. As it is being milled, the RAP drops onto an integrated conveyor system which moves the RAP into piles along the shoulder of the road for use on-site or directly into trucks to be hauled-off for further processing or for use off-site. The milling process can be tailored to the needs of the Company's customers--the desired depth of the milling; the desired condition of the remaining roadway surface after milling; the volume of RAP required by the customer for on-site purposes versus off-site purposes; the volume of RAP required in raw form versus the volume requiring further processing in hot plant recycling.

The Company will sell essentially all the RAP manufactured by its milling machine to retail customers. Most will be sold to the corporation that owns the Company, but some will be sold to other, unrelated third parties. Some RAP will be sold as is, while some will be processed further and sold in various hot asphalt mixes. The Company will not use the RAP for any purpose but resale. The Company's only business is manufacturing.

We have no documents that are particularly relevant to the Department's review of this question. No audit or litigation is pending with the Department regarding this issue. The Department has not previously ruled on the same or a similar issue for the Company, nor has the Company ever submitted the same or a similar issue and then withdrawn it before a letter ruling was issued.

The Department, in a letter ruling dated January 13, 2003, ruled on the Company's eligibility as a manufacturer for the MM&E exemption on purchases of qualifying property. This request differs in that we are seeking clarification that the property being purchased qualifies for the MM&E exemption.

The Department issued a general information letter (ST 01-0247-GIL), dated November 29, 2001, to address whether a milling machine qualifies for the MM&E exemption, but did not rule on the matter. The GIL laid out the principles for making the determination, but did not specifically apply those principles to the milling machine. Based on the

principles identified in the GIL, the Company believes that a milling machine would indeed qualify for exemption, and desires confirmation of that from the Department.

The Department issued another general information letter (ST 02-0089-GIL), dated April 24, 2002, to address whether brush chippers, tub grinders and stump grinders that manufacture mulch from trees qualify for the MM&E exemption. This is relevant because the manufacturing process involved in mulching is very similar to the milling process that produces RAP. The Department indicated that these types of machines would generally qualify for the MM&E exemption if they 'are used primarily (over 50% of the time) to create mulch for retail or wholesale sale.' The Company will sell essentially all of the RAP it produces with its milling machine and, thus, the machine should qualify for exemption just like the chippers and grinders identified in the GIL.

The Company is not aware of rulings or authorities contrary to its position. Other cases that may be relevant to the Department's decision include the following: G.S. Lyons & Sons v. Department of Revenue, 23 Ill. 2d 180 (1961); T.M. Madden & Co. v. Department of Revenue, 272 Ill. App. 3d 212 (1995); Illinois Valley Paving Inc. v. Department of Revenue, 294 Ill. App. 3d 1123 (1998); Van's Material Co. v. Department of Revenue, 131 Ill. 2d 196 (1989).

Attached is some general marketing information regarding the type of machine the Company is intending to purchase. It describes the capabilities of the machine and the variety of uses to which the RAP can be applied.

Ruling Request

The Company would like the Department to rule that its purchase of a milling machine, for use in accordance with the facts described above, qualifies for the MM&E exemption.

Thank you very much for your attention to this matter. There is no specific trade secret information that needs to be deleted from the publicly disseminated version of the private letter ruling. Attached is a properly executed power of attorney. If you have any questions, or need any additional information, please contact me.

Under the Retailers' Occupation Tax Act, the manufacturing machinery and equipment exemption is available for machinery and equipment used primarily (over 50% of the time) in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. See 86 Ill. Adm. Code 130.330, enclosed. "Manufacturing" is defined as the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, which changes some existing material or materials into a material with a different use, form, or name. These changes must result from the process in question and be substantial and significant.

If machinery or equipment purchased for use in an asphalt production operation meets these requirements, it can be purchased tax-free by giving the certification described at Section 130.330(g). However, the purchase of machinery or equipment that will be primarily used to store, convey, handle or transport materials prior to their entrance into the production cycle would be subject to tax. A machine that primarily breaks up old road surfaces and then transports the broken material to the plant prior to its entrance into the first production station where it is mixed with other materials would

not be considered a manufacturing activity for the purpose of the exemption. Section 130.330(d)(4)(C).

It is also important to keep in mind the requirement that over 50% of the produced material must be for wholesale or retail sale or lease. The purchase of machinery or equipment for use in an asphalt production process would be taxable if the majority of produced asphalt were to be used by the same business to fulfill contract jobs such as the paving of roads or parking lots. This is because under Illinois law the asphalt producer would be acting as a construction contractor and would itself be using the asphalt by converting it into real estate. See, *Illinois Valley Paving, Inc. v. Department of Revenue*, 294 Ill. App. 3d 1123 (1998); *Thomas M. Madden and Company v. Department of Revenue*, 272 Ill. App. 3d 212 (1995).

In the situation you describe, the milling machine is performing a procedure that is commonly regarded as manufacturing. The milling machine is producing an article of tangible personal property by changing an existing material into a material with a different use, form and name. Further, the company is manufacturing the reclaimed asphalt paving for retail sale. Therefore the manufacturing test set forth above is met and the milling machine would qualify for the manufacturing machinery and equipment exemption.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.